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Case C-109/01, *Secretary of State for the Home Department v. H. Akrich*, judgment of the Full Court of 23 September 2003, [2003] ECR I-9607.

1. Introduction

The ruling in *Akrich*,¹ delivered by the full Court, concerns fundamental issues of policy in relation to the impact of Community law upon Member States immigration rules: how far can the Union citizens' right to gain entry and residence permits for their spouses in situations regulated by Community law be used to circumvent the national provisions controlling migration fluxes from outside the Union?² Can a Union citizen's spouse who is unlawfully present in the Union territory rely on Community law to rectify his legal situation? The issue is one of great importance for migration policies: first of all, there is a significant danger of marriages of convenience; secondly, there is a widespread tendency to penalise abuses of immigration rules with deportation. Thus, many Member States provide that marriage can *never* be used to rectify the illegal status of a third country national, and that therefore a person who is unlawfully present within the State's territory has in any case to leave and apply for entrance clearance from her own State of origin. However, if the situation were to fall within the scope of Article 10 Regulation 1612/68,³ deportation would not be possible unless justified by the public policy derogation.

1. Also annotated by White, under the title "Conflicting Competences: Free Movement Rules and Immigration Laws", 29 EL Rev. (2003), 385.

2. Another important issue now relates to the possibility for Union citizens who have no link with any of the Member States, to exploit their citizenship to enter and reside in a Member State other than that which granted citizenship, see Case C-200/02, *Chen*, judgment of 19 October 2004. For a similar issue, turning on nationality rules, see the older Case C-369/90, *Micheletti and others v. Delegación del Gobierno en Cantabria*, [1992] ECR I-4239.

3. Council Regulation 1612/68, on freedom of movement for workers within the Community O.J. 1968, Spec Ed No L 257/2, as amended. Consolidated version available at www.europa.eu.int/eur-lex/en/consleg/pdf/1968/en_1968R1612_do_001.pdf (hereinafter Regulation 1612/68); Art. 10 Regulation 1612/68 will soon be repealed and replaced by the provisions under Directive 2004/38, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States O.J. 2004, L 158/77 (hereinafter Directive 2004/38). Directive 2004/38 improves the rights of third country national family members, *inter alia*, by providing for the retention (conditional upon given requirements) of the right to reside of third country nationals upon divorce from, or death of, the main rightholder (Arts. 12 and 13); and by providing for the possibility of a right to permanent residence (Arts. 16 et seq.).

It is clear that the right to family reunification provided by secondary legislation was drafted with a very simple situation in mind – that of a Union citizen, *already* married to a third country national,⁴ who wished to move to another Member State to there exercise an economic activity. Since the Union citizen was assumed to have a right to live with her spouse in the country of origin, deprivation of that right would result in a significant hindrance to movement. However, in such a simple scenario, the Member State of origin would have already cleared the immigration status of the third country national spouse; in this sense Article 10 Regulation 1612/68 might be seen as requiring a sort of mechanism of mutual recognition, intended to make the enjoyment of the free movement rights fully effective. However, matters become more complicated when the immigration status of the third country national has not been previously cleared, either because she was unlawfully present in the Union territory at the time of marriage, or because marriage post-dates movement. In those cases, Community law might well impinge upon migration policies, an area which is tainted by complex political choices, as well as much populist rhetoric.

2. Factual background

Mr Akrich was a Moroccan citizen. He first entered the United Kingdom in 1989 on a tourist visa and was subsequently denied leave to remain as a student. A few months later, he was found guilty of attempted theft and possession of a stolen identity card and as a result he was deported to Algiers. A year or so later he was arrested in the United Kingdom and again deported to Algiers. He returned illegally to the United Kingdom and in 1996 – whilst he was unlawfully present in the UK – he married a British citizen and applied for leave to remain as her spouse. His application was rejected and he was detained and then removed – at his own request – to Dublin where his wife had meanwhile gone to work. Mrs Akrich moved to Ireland with the sole intention of triggering the Treaty and thus being able to rely on the *Singh* ruling, which guarantees to Union citizens the right to bring back their spouses upon returning to their Member State of origin after having exercised one of the Treaty (economic) free movement provisions.⁵

4. For a comprehensive review of the rights of third country national family members, see Barrett “Family matters: European Community law and third-country family members”, 40 CML Rev. (2003), 369.

5. Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Singh*, ex parte *Secretary of State for the Home Department*, [1992] ECR I-4265.

Mr Akrich then applied for the revocation of the deportation order and for leave to enter and remain in the UK as the spouse of a British citizen. The Secretary of State for immigration refused to revoke the deportation order, and refused to grant entry clearance on the basis of the *Singh* ruling, relying on the fact that Mrs Akrich moved to Ireland only temporarily and with the sole purpose of triggering the Treaty. Therefore, in the Secretary of State's opinion, she could be refused the benefits granted by Community law since she had not been "genuinely" exercising her Article 39 EC rights and had moved with the sole intention of evading the UK's immigration rules.

Mr Akrich appealed against the decision of the Secretary of State and the Immigration Adjudicator found that the exercise of Mrs Akrich right to move under Community law was effective and was not tainted by her intention to go back to the UK and rely on the *Singh* ruling. The Adjudicator also found that Mr Akrich did not constitute a sufficient threat to public policy to justify the continuation of the deportation order. The Secretary of State appealed against this decision; during the appeal, the Appeal Tribunal requested a preliminary ruling from the Court of Justice enquiring whether a Member State is entitled to regard the intention of those who have exercised a Community law right in order to evade the application of national law; and if so whether the Member State is entitled to refuse to revoke a deportation order and to refuse to accord the right of entry to the non-national spouse.

3. Advocate General Geelhoed's Opinion

The Advocate General started with a brief overview of Member States' immigration policies in respect of third country nationals and in particular in respect of third country national spouses and sham marriages. He then reviewed the rights to move and reside of both economically active and economically inactive Union citizens together with the right of third country national spouses. The Advocate General noted that Article 10 Regulation 1612/68 does not make the rights of third country national spouses conditional upon nature or duration of the marriage;⁶ and that Directive 64/221⁷ imposes strict requirements on the possibility of invoking the public policy

6. Similarly Directive 2004/38 does not make the right to enter and reside in the Member State where the Union spouse has moved conditional.

7. Directive 64/221, on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health O.J. 1964 Spec. Ed, No 850/64 (hereinafter Directive 64/221); Directive 64/221 will be repealed in its entirety once Directive 2004/38 comes into force.

derogation. However, in purely internal situations the right for the third country national spouse to gain entry and residence might be (legitimately) made conditional upon individual circumstances, such as the duration of the marriage and the nature of the union.

After these preliminary observations, the Advocate General ventured in the analysis of the substantive provisions regulating the case at stake, and especially Article 39 EC, the scope of the *Singh* ruling, and the extent to which a possible *abuse* of Community law (i.e. the instrumental use of Community law to circumvent provisions of national law) might affect the rights granted by the Treaty to Union citizens.

Mr Geelhoed identified as the main question for consideration, the issue as to whether Community law, and in particular the Court's interpretation in the *Singh* ruling, granted rights also to those third country spouses who are present in the Union territory unlawfully, and thus have not undergone that individual assessment which characterizes immigration rules for non-Union citizens. In fact, in Mr Geelhoed's opinion, once it is accepted that the person is the spouse of a Union citizen for the purposes of Regulation 1612/68, or even for the purposes of Article 18 EC, no individual assessment may be carried out (not even as to whether the marriage is genuine) and the right to entry and reside can be limited only having regard to the Treaty derogations (which are interpreted narrowly).

Mr Geelhoed found that the *Singh* ruling could not be interpreted as granting third country nationals a right to enter the territory of the European Union without being subjected to the previous assessment required by immigration law. In the Advocate General's opinion the broad and generous interpretation of the free movement rights presupposes controls at the external borders of the Union. Thus, "internal freedom of movement of persons cannot function properly if it is made easier for nationals of non-Member States to use Community law in order to gain entry to the European Union without its having been possible to apply controls on entry".⁸ Therefore, in his opinion, Article 10 Regulation 1612/68 can be limited in cases in which the third country national spouse has not been granted entry clearance in the territory of the European Union in conformity with immigration law. Nor in this case was Article 8 of the European Convention of Human Rights particularly relevant; in this respect, the Advocate General distinguished the facts at issue here from those at issue in *Carpenter*: in the latter case, the matter was one of forced separation, whilst in the former, the couple could have continued to live together in Ireland.⁹

8. Opinion, para 135.

9. Of course one might well query whether, given what the A.G. had said about lawful

The Advocate General then turned to assess whether Mrs Akrich, the main right holder, fell within the scope of Community law. First, he found – not surprisingly – that all the objections raised by the UK to curtail Mrs Akrich rights under Community law were untenable. Thus, and this is consistent case law,¹⁰ the reason “why” a worker moves is immaterial for Article 39 EC to be triggered. Secondly, the public policy derogation could not be successfully invoked as there was no evidence that Mr Akrich – despite his criminal conviction – constituted a sufficiently serious threat to a fundamental interest of society, if that provision had to be interpreted within the narrow parameters established by Directive 64/221 and the Court’s case law.¹¹ Thirdly, there was no possibility of invoking the doctrine of “misuse of Community law”: the Advocate General compared the case at issue to that in *Centros*,¹² and found that just as in *Centros*, Mr and Mrs Akrich moved and installed themselves in another Member State (a key element of the right to move freely) and even though they were “using” the rights granted by Community law for a purpose not foreseen by the EC legislature, such purpose was “inherent” in Community law. He then concluded that even though Mrs Akrich was a worker protected by Community law, and even though Mr Akrich fell within the material scope of Article 10 Regulation 1612/68, it was open to the UK to rely on an overriding national interest in order to deny entrance to the worker’s spouse, following a prior individual assessment, on the basis of national immigration law. This was the case since Mr Akrich had not been admitted to the Union in accordance with the immigration laws of any of the Member States.

4. The Judgment of the Court

The Court followed a different legal analysis from the Advocate General. It started by assessing the scope of the *Singh* ruling. It restated that own nationals returning to their Member State of origin after having taken advantage of

residence as a precondition for enjoying rights under Community law, the couple had a *right* to stay in Ireland.

10. E.g. Case 53/81, *Levin*, [1982] ECR 1035, even though the reasons for taking up employment might be relevant to assess entitlement to social advantages, Case 197/86, *Brown*, [1988] ECR 3205 (although *Brown* has been partially overruled by Case C-184/99, *R Grzelczyk v. Centre public d’aide social d’Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, it is still good law on the relevance of intention), or to assess whether the activity is too marginal and ancillary to be considered employment, Case 344/87, *Bettray*, [1989] ECR 1621.

11. E.g. Case 30/77, *R v. Pierre Bouchereau*, [1977] ECR 1999.

12. Case C-212/97, *Centros Ltd and Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459.

the right to free movement enjoy the same rights as are conferred upon nationals of other Member States wishing to establish themselves – with their spouse – in a Member State in order to exercise an economic activity. However, the Court also found that Regulation 1612/68 is silent as to the condition of entry in the Union of third country national spouses. In the Court's finding, Article 10 Regulation 1612/68 applies only to a spouse who is *lawfully* resident in a Member State before moving to another Member State. In reaching this conclusion the Court adopted a traditional discrimination discourse: the reason why Article 10 Regulation 1612/68 confers on the worker's spouse the right to reside and work in another Member State, is to ensure that movement would not result in family separation. However, if the spouse is not lawfully present within the territory of the Member State of provenance, then there is no right for the couple to live together there. Therefore the fact that the third country national spouse (unlawfully present) cannot follow the Union citizen in another Member State does not result in any obstacle: as there was no right to start with, movement does not result in any loss. This said, the Court reiterated its case law on abuse of Community law – the reason why a worker moves is immaterial to the enjoyment of the rights conferred by the Treaty. The only possibility for abuse arises in the case in which the couple has contracted a marriage of convenience in order to enjoy the rights granted by Community law. In this case, Article 10 Regulation 1612/68 would not be applicable.

The Court then proceeded to assess the fundamental rights question in what is probably the most obscure part of the ruling. The Court found that in the case in which the spouse is not lawfully living in the territory of a Member State (and provided the marriage is genuine), the Member State where the couple seeks entrance must have regard to the right to family life as guaranteed by the European Convention of Human Rights.

5. Analysis

Neither the Advocate General's Opinion nor the Court's ruling can be said to benefit from an entirely persuasive legal analysis. The Opinion, even though thorough in assessing previous case law and the scope of Community rights, is in the end rather disappointing, as the Advocate General fails to explain why and how a right which is phrased in unconditional terms – i.e. the right for a worker to bring her spouse in another Member State – can be limited through a doctrine resonant of the imperative requirements doctrine. If Mr and Mrs Akrich fell within the material and personal scope of application of the Treaty and of Regulation 1612/68, it is difficult to understand how their

rights under Article 10 Regulation 1612/68 could be limited for overriding reasons of public interest (whilst of course they could be limited according to the narrower public policy derogation).

The Court's analysis avoids this trap and, in line with the aims of Regulation 1612/68, finds that a spouse of a worker who is not lawfully resident in the Union prior to marriage does not gain any right from Community law. This said, the ruling is not without considerable inconsistencies and some hermeneutic somersaults which are difficult to follow and conceptualize. First, the Court fails to relate its reasoning to the two most important recent rulings in the field of the rights of third country national spouses of Union citizens, *MRAX* and *Carpenter*.¹³ Secondly, it is not clear why the Court instructed the Appeal Tribunal to have due regard to Article 8 of the European Convention of Human Rights. If the matter fell outside the scope of Community law – as the Court seems to imply when stating that Article 10 Regulation 1612/68 does not apply – why a reference to the application of the general principles of Community law? These two questions will now be addressed in turn.

5.1. Relationship with existing case law – *MRAX* v. *Akrich*

Whilst the ruling under examination does not affect the ruling in *Singh* – after all the main point of that ruling was the equation of own nationals returning to their own Member State to non-nationals exercising their right of free movement – it is difficult to reconcile it with the rulings in *MRAX* (not even mentioned by the Court) and *Carpenter*. In *MRAX*, the Court held that Member States cannot deny entry to third country national spouses on the sole ground that the claimant has not obtained the required visa. Rather, the fact that Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148,¹⁴

13. Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgium*, [2002] ECR I-6591; Case C-60/00, *Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279. In Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, [2002] ECR I-7091, the Court found that a third country national who is the main carer of children in education derives a right to reside from her children's Community law right to reside. However, in that case Mrs R was lawfully present in the United Kingdom, the issue being one of failure to renew her residence permit.

14. Directive 68/360, O.J. 1968, Spec. Ed L 257/13, on the abolition of restrictions on movement and residence within the Community for workers of Member States and their family (hereinafter, Directive 68/360); Directive 73/148, O.J. 1973, L 172/14, on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (hereinafter, Directive 73/148; both Directives will be repealed by Directive 2004/38).

provide that Member States must accord every facility to family members to obtain the necessary visa means that the visa “must be issued without delay and, *as far as possible*, at the place of entry into national territory”.¹⁵ In any event, it would be disproportionate to send back at the frontier the family member who can prove family ties and identity. This part of the ruling is entirely consistent with the purposive interpretation of Community law adopted by the Court – interpretation which tends to be “very purposive” when individual rights are at issue. Not surprisingly, therefore, this part of the ruling has now been codified in Article 5(4) Directive 2004/38. However, more difficult to conceptualize, and in many respect to reconcile with the ruling in *Akrich*, is the Court’s answer to the second question raised by the national court. The question related to whether a Member State could legitimately refuse a residence permit and deport a spouse of a Community national covered by the free movement provisions on the sole ground that the spouse had entered the Member State’s territory unlawfully. The issue at stake, as appears clearly from *MRAX* pleadings, was exactly that of an unlawfully present third country national who – *after* having entered the national territory – marries a Union citizen covered by the free movement provisions. In other words, the question (also as understood by the Commission) related to the possibility to use Community law to rectify the “illegal” status of an immigrant through marriage. The Court’s answer, albeit phrased in more general terms, seems to endorse this possibility. The Court stated “a Member State is not permitted to refuse to issue a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State *on the sole ground that he entered the Member State concerned unlawfully*”.¹⁶ Therefore, before the ruling in *Akrich*, it was to be assumed that the legal status of third country nationals prior to marriage was immaterial to the couple’s rights under Community law. However, in *Akrich*, the Court excludes from the scope of Regulation 1612/68 – without however mentioning *MRAX* – those spouses who, before marriage, are illegally present within the territory. The two rulings seem therefore inconsistent and it is possible that the Court has overruled, without saying so, this part of the *MRAX* ruling.

Furthermore, following *MRAX* and *Akrich*, it is not clear what is the legal situation of a spouse of a Union national who has yet to enter the Union territory, i.e. who has never been lawfully present within the Union. The first part of the ruling in *MRAX* related, mainly if not only, to those entering the

15. *MRAX*, *supra* note 13, para 60.

16. *MRAX*, *supra* note 13 para 80 and operative part of the ruling, emphasis added.

Union territory for the first time.¹⁷ In that case the Court accepted that Article 10 Regulation 1612/68 applied, therefore excluding the possibility of imposing the “individual assessment” required by national immigration rules. On the other hand, the ruling in *Akrich* makes the rights derived by Community law for those spouses conditional upon their being *already* lawfully present within the Union territory. It remains unclear therefore whether the ruling in *Akrich* also overrules the first part of the ruling in *MRAX* and excludes spouses who have not yet entered the Union from the scope of Regulation 1612/68, or whether we should construe the ruling, despite its wording, as excluding from the scope of Article 10 only those who are “unlawfully present”, rather than all those who are not *already lawfully* present. Despite appearances, the distinction is not mere linguistic sophistry but it reflects substantive issues, which will determine whether those Union citizens who marry someone who is not a Union resident will lose the benefits of seeing their partner admitted and able to work without any significant formality, or whether they will have to undergo the, sometimes rather strict, tests provided by national immigration law. To put it more simply, had Mr Akrich joined his wife in Ireland directly from Morocco, would the couple have enjoyed the rights provided in Article 10 Regulation 1612/68, or would have they been subject to the more stringent national immigration rules?

Despite the wording of the ruling, the former seems to be the correct solution, not only because this would be consistent with the purposive and generous interpretation which characterizes the jurisprudence of the Court in the field of individual rights, but also because of the very wording of Regulation 1612/68 which (like Art. 5 Directive 2004/38) does not make the spouses’ right to enter and reside conditional upon their being already present in the territory of the Union. Therefore, even after (and despite) *Akrich*, the first part of the ruling in *MRAX* should still stand and Member States should not be entitled to deny entry and residence to spouses who are first-comers in the Union territory unless the derogations apply, with the *caveat* (added in *Akrich*) that marriages of convenience fall altogether outside the scope of Article 10 Regulation 1612/68.¹⁸

17. *MRAX*, *supra* note 13: “The Belgian State adds that many matters relating to a third country national can be clarified only by the Belgian representation in *his country of origin*” (para 45, emphasis added); “As Community legislation does not specify the measures which a Member State may take should a third country national married to a Member State national *wish to enter Community territory*” (para 57, emphasis added). Thus, it is clear that the situation at issue in *MRAX* was whether a first-entrant spouse could be sent back to her country of origin if her papers were not in order.

18. This is now expressly stated by Art. 35 Directive 2004/38; para 24 of the Preamble to

This leads us to another difficult question which has yet to be decided by the Court: if Article 10 Regulation 1612/68 does not apply to sham marriages, are Member States allowed to carry out (on a non-discriminatory basis) *systematic* scrutiny on the *nature* of the relationship, to assess whether the relationship is one which is significant for Community law purposes?¹⁹ The Council Resolution on marriages of convenience, together with a purposive interpretation of Community law, might suggest a negative answer.²⁰ Article 3 of such Resolution provides that “Where there are *factors* which *support suspicions* for believing that a marriage in one of convenience, Member States shall issue a residence permit or an authority to reside to the third-country national on the basis of the marriage only after the authorities competent under national law have checked that the marriage is not one of convenience, and that the other conditions relating to entry and residence have been fulfilled”. The reference to the need for supporting factors corroborating the suspicion over the nature of the marriage *before* the Member State is entitled to delay issuing residence permits, seems to imply that there is no possibility for systematic scrutiny, i.e. for a scrutiny/delay where there are no factors indicating a marriage of convenience. Even though a Resolution is only a form of soft law, and therefore not legally conclusive, it is in line with the general principle enshrined in Directive 64/221 which, whilst allowing for exchange of information in relation of police records, excludes the possibility that such enquiries can be made as a matter of routine. Furthermore, there could be no doubt that systematic scrutiny of the nature of one’s relationship in *itself* could be construed as a barrier to movement.

5.2. Relationship with existing case law – *Carpenter v. Akrich*

If the relationship between the ruling in *MRAX* and *Akrich* is somehow obscure, the relationship between *Akrich* and the ruling in *Carpenter* is even more complex.²¹ In *Carpenter*, Mrs Carpenter was also *unlawfully* present in the territory. If it is true that there was no issue in that case of the application

that Directive states that Member States should have the possibility of enacting the necessary measures against abuse of rights and fraud, and especially marriages of convenience.

19. Of course this problem arises only in those cases in which the nature of the marriage has not been already cleared in the Member State of origin, as in that case the Member States have to trust the assessment made by the immigration authorities of that State.

20. Council Resolution of 4 Dec. 1997, O.J. 1997, C 382/1, on measures to be adopted on the combating of marriages of convenience.

21. Annotated by Acierno under the title “The *Carpenter* judgement: fundamental rights and the limits of the Community legal order”, 28 EL Rev. (2003), 398.

of Regulation 1612/68 and Directives 68/360 and 73/148 (Mr Carpenter was a service provider who was seeking to establish the right of his wife not to be deported from *his* own Member State), the *unlawful* status of Mrs Carpenter found no part in the Court's reasoning. Rather the Court held that the deportation of Mrs Carpenter would affect the conditions under which Mr Carpenter provided intra-Community services, and therefore could be construed as a barrier to the freedom to provide services. Having established a link with Article 49 EC, which necessitated the State to justify its strict rules on immigration, the Court could analyse such rules in relation to Article 8 of the European Convention of Human Rights.²² In *Carpenter*, the illegal status of Mrs Carpenter was immaterial. The deportation of Mrs Carpenter was construed as a barrier to the cross-border provision of services and therefore Community law, and its general principles, applied.

In *Akrich*, on the other hand, the Court focused solely on the rights provided by Article 10 Regulation 1612/68. It then found that in that case, i.e. when the Union citizen is relying on secondary legislation rather than on the primary Treaty provisions, the lawful or otherwise status of the spouse is *relevant* and the situation of an "illegal" immigrant does not fall within the scope of Community law. The different outcome of the two rulings has probably more to do with the specific facts which gave rise to the cases, than with a rational and conscious choice of the Court. After all, in *Carpenter*, Mrs Carpenter had done nothing illegal besides overstaying her permit; the marriage was not a sham; there were children involved and the rules, which required deportation with no consideration given to the actual circumstances of the individuals affected, were problematic in relation to the right to family life. On the other hand, Mr Akrich had committed offences in the UK prior to his marriage; had entered the country illegally (i.e. without even a tourist visa); and – something which seemed to have considerable weight in the Advocate General's mind – the issue was not one of deportation since the Akrichs could have continued to live together in Ireland. The right to family life was therefore affected – if at all – considerably less than in the case of the Carpenters.

However, if the specific circumstances surrounding the two cases might well explain the different paths followed by the Court, it is difficult to extract a general rule in relation to the rights and status of family members of Union citizens who are unlawfully present in the territory of the Union. Do *illegal*

22. Deportation clearly affects the right to family life enshrined in Art. 8 ECHR; cf. e.g. European Court of Human Rights rulings in *Moestaquim v. Belgium*, Judgment of 18 Feb. 1991, Series A No. 193; *Nasri v. France*, Judgment of 13 July 1995, Series A No. 320-B.

migrants ever fall within the scope of Community law? There are two possible answers to this question: first, it could be that the ruling in *Akrich* overrules the ruling in *Carpenter*. The Court has stepped back and recognized the exclusive competence of the Member States – lacking harmonizing rules – to regulate the migration fluxes from outside the Union boundaries. This seems to be the view endorsed by the Advocate General: only once a third country national is lawfully present in the Union territory can he derive rights as a family member of a Union citizen. This solution, consistent with both letter and spirit of the *Akrich* ruling, poses one considerable hermeneutic problem: the Court's instruction to have due regard to the right to family life as guaranteed by the European Convention of Human Rights. If the situation falls altogether outside the scope of Community law, then Community law does not and *cannot* apply. Fundamental rights can be relevant as a matter of national law, but not as general principles of Community law. The incongruous reference to the European Convention of Human Rights then could only signify a considerable expansion of Community law (fundamental rights as general principles of Community law always apply regardless of whether the situation falls within the scope of Community law) which would be highly questionable from a legal (as well as political) perspective and at odds with Opinion 2/94 where the Court expressly denied the possibility of a general fundamental rights competence for the European Community.²³ Or else, such reference would be a (just as legally questionable) reminder to the national court to take into due consideration the obligations arising in national and international law from the European Convention of Human Rights.

Secondly, it could be that the ruling in *Akrich* does not affect the ruling in *Carpenter* and that the scope of the former is much narrower than it might seem at first sight. The situation of someone unlawfully present within the Union's territory falls outside the scope of Article 10 Regulation 1612/68 and therefore there is no "unconditional" right to family reunification. However, restrictions on the possibility for a Union migrant to bring her spouse with her can still be seen as an obstacle to the Union citizen's right to move – and this regardless of the prior immigration status of the spouse. It needs therefore to be justified according to an imperative requirement of public interest (which even though not specified in *Carpenter* would be control of migration fluxes) *and* to comply with fundamental rights (and proportionality) as general principles of Community law. This reading is consistent with the fact that obstacles to the right to bring family members are first and foremost

23. Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

obstacles to movement.²⁴ Therefore, if the spouse falls within the scope of secondary legislation, he will derive extensive rights – to enter/reside/work – which can be limited only according to the Treaty derogations interpreted narrowly and in accordance with Directive 64/221. However, if secondary legislation does not apply, either because the Union citizen resides in her own Member State or because the spouse does not fall within the scope of Community secondary legislation, then the immigration rules can still be seen as an obstacle to the full and effective exercise of the right to free movement enjoyed by the Union citizen and are subject to the proportionality / fundamental rights scrutiny. After all, it is not the first time that the Court creates a space between the black letter of secondary legislation, and the Treaty provisions.²⁵

In this way, not only are the two rulings consistent with each other, but also the reference to the European Convention of Human Rights in *Akrich* can be explained and justified.

6. The rights of Union migrants and their third country national spouses

To summarize, the situation for third country national spouses of Union citizens who have exercised their free movement right seems to be as follows:

– Member States cannot deny entrance to third country nationals who are first entering the Union and can prove family ties and identity on the *sole* ground that they lack the required visa (*MRAX* now codified in Art. 5(4) Directive 2004/38). However, marriages of convenience fall outside the scope of Community law (*Akrich*) – i.e. do not constitute a relationship relevant for Community law purposes. The assessment of the nature of the marriage should not be systematic, but only arise when there are other factors which point at the possibility of a sham. In this case, the assessment must be made

24. And given that this can hardly be disputed, when will the Court finally recognize that the non-recognition of rights to same sex partners is in *itself* a hindrance to movement which falls within the scope of Community law?

25. Cf. the citizenship case law and in particular *Baumbast*, *supra* note 13; see Dougan and Spaventa “Educating Rudy and the (non-) English Patient: A double-bill on residency rights under Article 18 EC”, 28 EL Rev. (2003), 699; see also the health care cases, and in particular Case C-385/99, *Müller Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, and *van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, [2003] ECR I-4509, and Spaventa “Public services and European law: Looking for boundaries” 5 CYELS (2002–3), 271.

according to the same criteria that would apply to own nationals (principle of non-discrimination), and are in any event subject to the principle of proportionality and effectiveness according to general principles of Community law.

- Regulation 1612/68 and Directives 68/360 and 73/148 confer a right to the spouse who is already lawfully present within the Union territory to follow the Union citizen, which can be limited only according to the public policy/security/health derogations and in compliance with Directive 64/221 (and in the future Articles 27 et seq. of Directive 2004/38).

- Regulation 1612/68 and Directive 68/360 and 73/148 (and in the future Directive 2004/38) do not apply to those who have not cleared their immigration status in the Union country from which they are moving in order to follow their spouses to other Member States. Therefore the host Member State need not have recourse to the public policy derogation (which is narrowly construed and curtailed by the provisions of Directive 64/221) to deny entry/residence permits to spouses who are (prior to moving) unlawfully present within the Union territory (*Akrich*).

- However, denial of a residence permit or right to enter to the spouse (regardless of prior migration status) of a Union citizen exercising a Treaty free movement right can be construed as an obstacle falling within the scope of the free movement provisions, and it has therefore to be justified according to the broader imperative requirements doctrine (*Carpenter*), and must comply with fundamental rights and proportionality as general principles of Community law (*Carpenter* and *Akrich*).

7. Conclusions

In several recent rulings the Court seems to have given up hermeneutic clarity and consistency in favour of a case-by-case assessment which is very much based on the facts which gave rise to the reference, and cannot easily be extended to other cases the facts of which differ – if only partially – from previous rulings. This, for a Court which should provide clear guidance to national judiciaries (and administrative authorities) as to the scope of Community law, is a regrettable trend, and it is even more open to criticism when systematically endorsed by the full Court.

The ruling in *Akrich*, despite appearances, represents only a very limited concession to the Member States' regulatory competences in the field of migration. What it gives with one hand, it almost entirely takes away with the other. Thus if it clarifies that Community law cannot be used to rectify the situation of illegally present immigrants, thus excluding the possibility of an

unconditional Community green card, it also seems to endorse the view – already expressed in *Carpenter* – that Community law imposes on the Member State a duty to respect both proportionality and fundamental rights in applying their immigration rules.²⁶ Migration policies are yet another field in which Member States can be regarded as only “semi-sovereign”.

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26. On the increased tendency of the Court to subject national law to a general proportionality assessment, see Spaventa “From *Gebhard* to *Carpenter*: Towards a (non-)Economic European Constitution” 41 CML Rev. (2004), 743.

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